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October 9, 2008

Tukwila Planning Commission
c/o Department of Community Development
6300 Southcenter Blvd., #100
Tukwila, WA 98188

RE: Shoreline Master Program Update

Dear Commissioners:

We represent Baker Commodities, Inc., a rendering plant located north of I-405 in the light industrial zone at 5795 S. 130th Place. *See Map, Attachment A.* As a landowner along the Green/Duwamish Waterway, Baker would like to provide comments on several areas of concern in the draft Shoreline Master Program ("SMP") currently under consideration by the Planning Commission. Comments are provided below in two areas: specific concerns related to issues already litigated against the City of Tukwila, and general concerns that echo the comments of other potentially affected landowners.

As part of these comments, we respectfully request that the Planning Commission step back from the current process, assemble a citizen's stakeholder group to provide meaningful public participation, and work to develop an update to the Shoreline Master Plan that, in the City's own words, reaches a better "balance in addressing the needs of its residential community and the environment with the challenges of maintaining and enhancing a vibrant development climate."¹

¹ See *City of Tukwila*, <http://www.ci.tukwila.wa.us/general/general.html> (Oct. 8, 2008).

EXHIBIT 45 DATE 10/9/08
PROJECT NAME Ship Update
FILE NO 206-088

October 9, 2008

Page 2

I. Concerns Related to Issues Already Litigated Against the City of Tukwila

The draft SMP purports to adopt standards that are adverse to a settlement agreement that Baker already reached with the City of Tukwila a number of years ago. For example, the draft SMP provides vague definitions of what development would be along the shoreline area, including the “exterior alteration of structures.” In addition, the draft SMP would require public access to all property that abuts the Green/Duwamish River shoreline, absent the property owner taking specific action to exempt their property (Section 11).

These provisions run contrary to previous litigation. In early 1996, Baker challenged certain aspects of the City of Tukwila’s newly adopted Comprehensive Plan and Development Regulations. This challenge specifically addressed several key issues raised by the draft SMP, including the use, development, and redevelopment of the property listed above. The City of Tukwila and Baker reached a Settlement Agreement to address these issues. *See Attachment B*, Settlement Agreement between City of Tukwila & Baker Commodities, CPSGMHB File No. 96-4-0008 (May 7, 1996). This agreement was then approved by the Central Puget Sound Growth Management Hearings Board. *See Attachment C*, Order Granting Stipulated Dismissal, Baker Commodities Inc. v. City of Tukwila, CPSGMHB File No. 96-5-0008 (May 13, 1996).

The Settlement Agreement specifically provides several key statements pertinent to the draft SMP. For example, Paragraphs 1 through 3 require the City of Tukwila to adopt a code interpretation governing the use, development and re-development of rendering facilities, followed by the requirement to pursue an amendment to codify the same. The Code Interpretation, dated May 3, 1996 and included as part of the Settlement Agreement (*Attachment B*), provides that “[n]ormal upkeep, repairs, maintenance, strengthening, or restoration to a safe condition of any building or structure being used as part of an unclassified use shall not require a new or unclassified use permit. The replacement of existing structures with either new structures of equivalent size and/or capacity, or new structures which do not change the use and do not constitute an expansion or enlargement... shall not require a new or revised unclassified use permit.” *Code Interpretation at 1, Attachment B*. The interpretation further provides that “[a] legal use does not become nonconforming because the zone in which it is located is changed to a zone which requires an Unclassified Use Permit for the use, or because the use is changed from an allowed use to an unclassified use within the same zone...” provided the use is not expanded or buildings enlarged under specified criteria. *Id. at 2-3*.

The Director of the City of Tukwila’s Community Development Department noted that code interpretation “furthers the City’s goals of encouraging owners of such facilities to update, modernize and improve its facilities to minimize existing impacts upon the surrounding vicinity...” He further notes that for “normal upkeep and repairs”, the provisions both recognize the historic practice of DCD and “court decisions that have upheld the rights of property owners to maintain legally established improvements and investments.” *Id. at 5-6*.

October 9, 2008

Page 3

In addition to the agreements on use, upkeep and repair, the Settlement Agreement provides that "there is no legal basis on which the City could impose a condition on any permit for redevelopment or expansion of the rendering plant that would require that Baker construct, dedicate or otherwise provide a public access trail or other form of public access across the property on which Baker operates its rendering facility." *Settlement Agreement*, ¶ 4. Such public access rights would also run counter to an agreement between Baker and the Burlington Northern Santa Fe Railroad, which has granted a limited access easement for Baker to reach its property. Not only would public access violate both the Settlement Agreement and the easement agreement, it would create a public safety hazard by providing access to an industrial area.

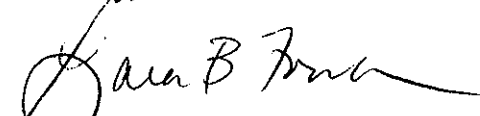
Based upon the 1996 Settlement Agreement, Baker would like to maintain its right to use its legally established improvements and investments in its property, and opposes any requirement for public access to its property.

II. General Comments

As with other landowners in this area, Baker is concerned about the wide variety of mechanisms that could trigger the draconian requirements set out in the draft SMP, including those affecting access, redevelopment, use or expansion of buildings and parking, vegetation, and so on, especially since the draft SMP would render a number of buildings and the parking area non-conforming. Baker Commodities, Inc. has signed a letter along with other industrial stakeholders addressing these concerns in greater detail and incorporates those concerns by reference here. In addition, Baker has reviewed the comment letter prepared by Courtney A. Kaylor of McCullough Hill PS on behalf of La Pianta LLC and concurs with the concerns raised in that letter.

Based on these concerns, we request that the draft SMP be revisited and the potential impacts to the City of Tukwila's businesses be reconsidered.

Sincerely,



Lara B. Fowler

LF:lf

cc: Mitch Ebright, Vice President, General Counsel, Baker Commodities, Inc.
Dick Hinthorne, General Manager, Baker Commodities, Inc.
Jack Pace, Director, Department of Community Development
Carol Lumb, Senior Planner, Department of Community Development

Attachments

iMAP



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Date: 10/9/2008 Source: King County iMAP - Property Information (<http://www.metrokc.gov/GIS/iMAP>)



iMAP

Highlighted Feature

County Boundary

Mountain Peaks

Highways

Urban Growth Area Line

Incorporated Area

Streets

Highway

Arterials

Local

Lakes and Large Rivers

Streams

Parcels

Parks

Comprehensive Plan

Land Use

Unincorporated Activity Center

Community Business Center

(cont)

Neighborhood Business Center

Commercial Outside of Centers

Urban Plan Development

Urban Residential >12 du/acre

Urban Residential 4-12 du/acre

Urban Residential 1 du/acre

Rural City Urban Growth Area

Rural Town

Rural Neighborhood

Rural Residential 1 du/2.5-10 ac

Industrial

Forestry

Agriculture

Mining

Greenbelt Urban Separator

King County Owned Open Space/Recreation

Unincorporated KC

Zoning

(cont)

A-10 - Agricultural, one DU per 10 acres

A-35 - Agricultural, one DU per 35 acres

F - Forest

M - Mineral

RA-2.5 - Rural Area, one DU per 2.5 acres

RA-5 - Rural Area, one DU per 5 acres

RA-10 - Rural Area, one DU per 10 acres

UR - Urban Reserve, one DU per 5 acres

R-1 - Residential, one DU per acre

R-4 - Residential, 4 DU per acre

R-6 - Residential, 6 DU per acre

R-8 - Residential, 8 DU per acre

R-12 - Residential, 12 DU per acre

R-18 - Residential, 18 DU per acre

R-24 - Residential, 24 DU per acre

R-48 - Residential, 48 DU per acre

NB - Neighborhood Business

(cont)

CB - Community Business

RB - Regional Business

O - Office

I - Industrial

Other

2005 Color Aerial

Photo

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IMAP



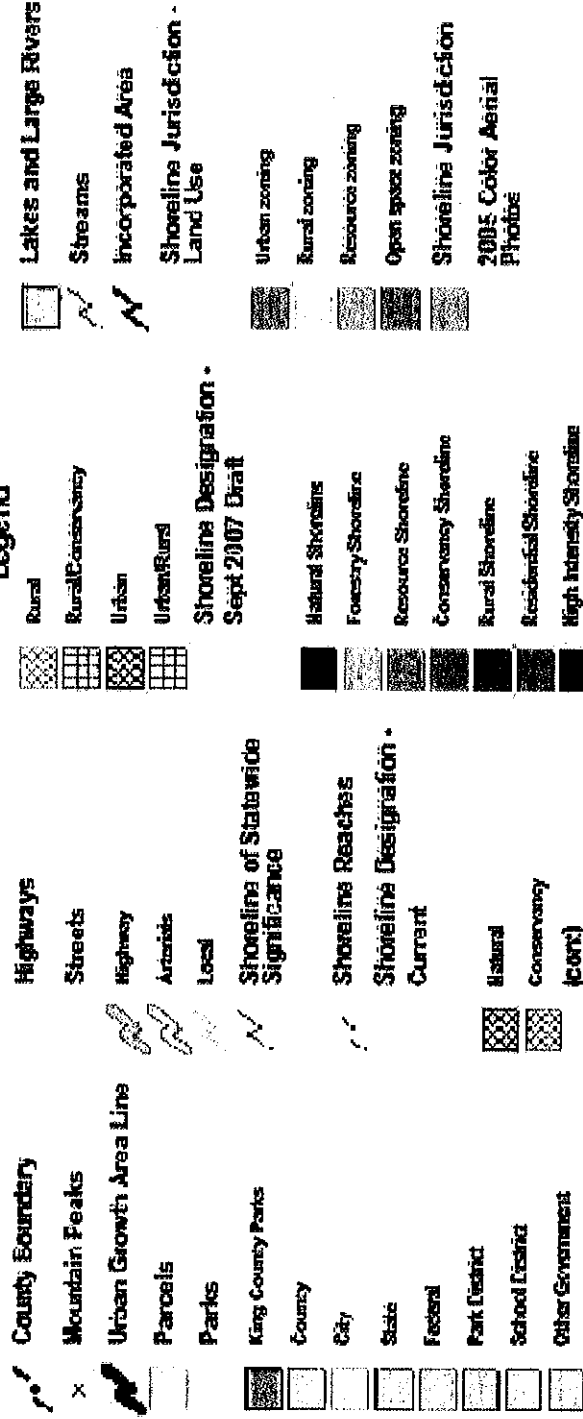
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Date: 10/9/2008 Source: King County MAP - Shoreline Master Program (<http://www.metrokc.gov/GS/IMAP>)



iMAP



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Date: 10/9/2008 Source: King County iMAP - Shoreline Reaches Program (<http://www.kingcounty.gov/iMAP/>)

Settlement Agreement

City of Tukwila

&

Baker Commodities, Inc.

The City of Tukwila, a Washington municipal corporation (hereafter "Tukwila") and Baker Commodities, Inc., a Delaware corporation (hereafter "Baker") enter into the following agreement:

Whereas, Baker is the operator of a rendering works located in Tukwila; and

Whereas, in 1995, Tukwila adopted a Comprehensive Plan and Development Regulations pursuant to the Washington Growth Management Act; and

Whereas, the Development Regulations zone the property owned by Baker as Light Industrial; and

Whereas, Baker filed an appeal to the Central Puget Sound Growth Management Hearings Board challenging certain aspects of Tukwila's 1995 Comprehensive Plan and Development Regulations pursuant to the Washington Growth Management Act, which appeal is File No. 96-3-0008 of the Hearings Board; and

Whereas, the parties mutually desire to settle the issues raised in File No. 96-3-0008;

Now, therefore, it is agreed as follows:

1. Tukwila agrees that, concurrently with the execution of this Agreement, the Director of the Department of Community Development will issue a Code Interpretation regarding the use, development and re-development of rendering facilities in the Light Industrial Zone and other issues in the form attached as Exhibit 1.
2. Tukwila agrees that it will propose amendments to its Development Regulations to adopt certain standards regarding the use, development and re-development of rendering facilities in the Light Industrial Zone. Tukwila's Department of Community Development agrees that it will strongly and diligently support the adoption of such amendments by the City Council. The amendments which will be proposed are attached as Exhibit 2.

3. The amendments attached in Exhibit 2 will be proposed as part of a group of amendments which will be considered and diligently pursued by the City Council within the next two months.
4. Tukwila agrees and acknowledges that there is no legal basis on which the City could impose a condition on any permit for redevelopment or expansion of the rendering plant that would require that Baker construct, dedicate or otherwise provide a public access trail or other form of public access across the property on which Baker operates its rendering facility.
5. The use of 124th Street South, 50th Place South and 130th Place South by truck traffic to and from the Baker site is and will be permitted. It is agreed that 56th Avenue South is a residential access street and that truck traffic is not permitted to use that route into or out of the Baker site. It is acknowledged that Baker does not control all of the trucks which drive to or from its site. However, Baker agrees to direct those trucks which are under its control to not use 56th Avenue South and to advise the drivers of other trucks to avoid the use of that street.
6. Baker and Tukwila agree to direct their respective counsel to execute and file a Stipulation agreeing to the dismissal, without prejudice, of Baker's appeal to the Growth Management Hearings Board.
7. The parties recognize and acknowledge that the City cannot guarantee that the amendments set forth in Exhibit 2 will be adopted because any proposed amendment to the Development Regulations requires a public hearing process, which has not been completed. Regardless of whether the amendment to the Development Regulation is adopted, the Code Interpretation will remain in effect. In the event that the City does not adopt the amendments essentially the same as attached in Exhibit 2, the parties agree that Baker may do either or both of the following:
 - a. File a new appeal of the 1995 Comprehensive Plan and Development Regulations to the Washington Growth Management Hearings Board. In such event, Tukwila stipulates that it will not object to such appeal on the grounds that it is not filed in a timely manner and Baker stipulates that it will not raise any issues which were not raised in Case No. 96-3-0008.
 - b. File a request with Tukwila to amend the Comprehensive Plan and Development Regulations pursuant to the Washington Growth Management Act, and if the amendments proposed by Baker are not adopted, appeal Tukwila's failure to adopt such proposed amendments to the Growth Management Hearings Board. In such event, Tukwila stipulates that it will not object to such appeal on the grounds that the issues raised could have been or were raised in any previous appeal.

Agreed to this 7 day of May, 1996:

Baker Commodities, Inc.

by: B. F. Kelly

title: Executive Vice President

City of Tukwila

by: John W. Rants

title: Mayor

6503AG03.rdj

CODE INTERPRETATION FORM

CODE INTERPRETED:	ZONING CODE
SECTION NO.:	18.66.020 USES REQUIRING AN
	UNCLASSIFIED USE PERMIT (UUP)
DATE INTERPRETATION MADE:	MAY 3, 1996

Interpretation:

(1) Normal Upkeep, Repairs and Maintenance.

Normal upkeep, repairs, maintenance, strengthening, or restoration to a safe condition of any building or structure being used as part of an unclassified use shall not require a new or revised unclassified use permit. The replacement of existing structures with either new structures of equivalent size and/or capacity, or with new structures which do not change the use and do not constitute an expansion or enlargement as described below, shall not require a new or revised unclassified use permit; provided that, in any event, any structure that is non-conforming by reason of its height, bulk, or setbacks shall not be re-constructed in a manner which increases the extent of the nonconformity. Nothing in this interpretation shall modify applicable requirements that such construction work may require a building permit or other construction permits pursuant to TMC ch. 16 (construction codes).

(2) Effect of Changes to Zoning Code or Zoning Map.

A legal use does not become nonconforming because the zone in which it is located is changed to a zone which requires an Unclassified Use Permit for the use, or because the use is changed from an allowed use to an unclassified use within the same zone; provided, however, the use may not

be expanded or buildings may not be enlarged without first obtaining an unclassified use permit for such expansion or enlargement if required pursuant to requirements listed under Intensification and Expansion, below.

(3) Intensification and Expansion of Animal Rendering Facilities.

In addition to the structures permitted pursuant to paragraph 1, above, existing animal rendering businesses shall be allowed to construct new facilities to update and/or modernize such use without needing to obtain a new or revised UUP if such construction involves an intensification of the permitted existing facility. For purposes of this interpretation, "facilities" shall refer to all structures, including tanks, processing equipment, buildings and other improvements used in the rendering operation, and "intensification" shall mean new construction shall meet all of the requirements below. Any proposed new construction which fails to meet one or more of the requirements of intensification shall be considered an enlargement or expansion, and shall require an application for a new or revised UUP for the facilities which constitute the enlargement or expansion.

A. The construction of new facilities shall be considered an intensification and may be permitted without the need to obtain an Unclassified Use Permit (UUP), if:

1. The total area of the site is not increased.
2. The construction of new facilities does not generate more than ten new vehicle trips at peak hour, as determined pursuant to established City policy and procedure related to traffic concurrency.

3. No new facilities are located in the River Environment or Low Impact portion of the Shoreline.

4. The new facilities will comply with the performance standards set forth below.

5. The construction of new manufacturing facilities does not result in more than a 5% cumulative increase in the manufacturing capacity of the processing facility.

6. The construction will not increase the extent of any nonconformity of any structure by reason of its height, bulk or setbacks.

B. Any proposed new facility which does not meet criteria A1 through A6, above, shall be considered an enlargement or expansion, and shall comply with the provisions of TMC Ch.

18.66, Unclassified Use Permits.

C. Whether or not a proposed new facility is considered an intensification or an expansion/enlargement, all other applicable codes such as construction codes, SEPA, etc., shall continue to apply.

D. Performance Standards

The following performance standards shall apply to rendering plants, in addition to the performance standards for the applicable zoning district:

1. Any new facilities constructed at a rendering plant which will be used for storage or transmission of liquid or semi-liquid products will be protected by containment facilities capable of preventing the release of any product into surface or ground waters in the

event of a spill or breakage. If more than one storage or transmission facility is protected by a containment facility, such containment facility shall be of sufficient size to contain a spill of the largest storage or transmission facility so protected.

2. Any new facilities will utilize the best feasible odor abatement equipment and shall be designed, constructed and operated so that the new facilities will not increase the risk of odor emissions from the site.

3. The facility, including both existing and new facilities, shall comply with applicable air pollution control requirements of the Puget Sound Air Pollution Control Agency, including both procedural and substantive standards.

4. A copy of the current Spill Prevention Control and Countermeasure Plan (SPCCP) as required by the Puget Sound Air Pollution Control Agency shall be on file with the DCD.

(4) Why Was This Interpretation Developed?

Legal action taken by Baker Commodities, Inc., has resulted in the need to clearly articulate objective circumstances under which modifications to Baker's rendering plant require the processing of an Unclassified Use Permit under the provisions of the Tukwila Municipal Code, and when such a permit is not required.

(5) What is the Justification of the Interpretation?

Court decisions like the one involving Baker Commodities, Inc., focus upon a distinction made by our courts between improvements proposed to existing facilities that involve an “intensification” of the use and those which involve an “expansion or enlargement” of the use. Expansions or enlargement of the existing use are subject to requirements related to obtaining a new or revised use permit, such as a new or revised UUP for Baker Commodities’ animal rendering plant. A proposed improvement which involves an intensification of the existing use, however, does not necessarily trigger a need under our zoning code to apply for a new or revised use permit.

Without criteria, it is difficult to determine when a proposed improvement to an existing facility constitutes an intensification or instead involves an enlargement. This interpretation provides that criteria, and provides notice and guidance to owners of existing facilities with Unclassified Use Permits, the public, city agencies and the courts as to when new improvements constitute an intensification and when they constitute an enlargement or expansion. In addition to providing guidance, this interpretation furthers the City’s goals of encouraging owners of such facilities to update, modernize and improve its facilities to minimize existing impacts upon the surrounding vicinity, without being inhibited from doing so because of the uncertainty as to whether the improvements require obtaining a new or revised UUP.

(6) Normal Upkeep and Repairs.

These provisions articulate what has been the historic practice of DCD. They also recognize court decisions that have upheld the rights of property owners to maintain legally established improvements and investments.

(7) Effect of Changes to Zoning Code or Zoning Map.

These provisions echo similar provisions of TMC 18.70.100 relating to conditional uses. There is no logical or policy basis to treat conditional and unclassified uses differently with regard to the effect of code or map changes.

Signature of Interpreter: Staveland

Date: May 3, 1996

Approved By: Staveland
Department of Community Development Director

Date: May 3, 1996

Exhibit 2

Proposed new sections to be added to the Zoning Code:

1. **New section TMC 18.66.110: Normal upkeep, repairs, and maintenance; replacement of existing structures.**

Normal upkeep, repairs, maintenance, strengthening, or restoration to a safe condition of any building or structure being used as part of an unclassified use shall not require a new or revised unclassified use permit. The replacement of existing structures with new structures of equivalent size and/or capacity, or with new structures which do not change the use and do not constitute an expansion or enlargement described below, shall not require a new or unclassified use permit, provided that, in the event that any structure that is non-conforming by reason of its height, bulk or setbacks, such structure shall not be re-constructed in a manner which increases the extent of the nonconformity. Nothing in this section shall modify applicable requirements that such construction work may require a building permit or other construction permits pursuant to TMC ch. 16 (construction codes)

2. **Revised TMC 18.70.100 Conditional and Unclassified Uses**

A legal use does not become nonconforming because the zone in which it is located is changed to a zone which requires a conditional or unclassified use permit for the use, or because the use is changed from an allowed use to a conditional or unclassified use within the same zone; provided,

however, the use may not be expanded nor may buildings be enlarged without first obtaining a conditional or unclassified use permit if required pursuant to requirements of TMC ch. 18.64 or TMC ch. 18.66. ~~the Conditional Use Permits chapter of this title.~~

3. New TMC 18.66.120 Expansion of Existing Unclassified Use - Animal Rendering Facilities

In addition to the structures permitted pursuant to paragraph 1, above, existing animal rendering businesses shall be allowed to construct new facilities to update and/or modernize such use without needing to obtain a new or revised UUP if such construction involves an intensification of the permitted existing facility. For purposes of this interpretation, "facilities" shall refer to all structures, including tanks, processing equipment, buildings and other improvements used in the rendering operation, and "intensification" shall mean new construction shall meet all of the requirements below. Any proposed new construction which fails to meet one or more of the requirements of intensification shall be considered an enlargement or expansion, and shall require an application for a new or revised UUP for the facilities which constitute the enlargement or expansion.

A. The construction of new facilities shall be considered an intensification and may be permitted without the need to obtain an Unclassified Use Permit (UUP), if:

1. The total area of the site is not increased.

2. The construction of new facilities does not generate more than ten new vehicle trips at peak hour, as determined pursuant to established City policy and procedure related to traffic concurrency.

3. No new facilities are located in the River Environment or Low Impact portion of the Shoreline.

4. The new facilities will comply with the performance standards set forth below.

5. The construction of new manufacturing facilities does not result in more than a 5% cumulative increase in the manufacturing capacity of the processing facility.

6. The construction will not increase the extent of any nonconformity of any structure by reason of its height, bulk or setbacks.

B. Any proposed new facility which does not meet criteria A1 through A6, above, shall be considered an enlargement or expansion, and shall comply with the provisions of TMC Ch. 18.66, Unclassified Use Permits.

C. Whether or not a proposed new facility is considered an intensification or an expansion/enlargement, all other applicable codes such as construction codes, SEPA, etc., shall continue to apply.

4. New Section TMC 18.66.130 Performance Standards for Rendering Plants

The following performance standards shall apply to rendering plants, in addition to the performance standards for the applicable zoning district:

A. Any new facilities constructed at a rendering plant which will be used for storage or transmission of liquid or semi-liquid products will be protected by containment facilities capable of preventing the release of any product into surface or ground waters in the event of a spill or breakage.

B. Any new facilities will utilize the best feasible odor abatement equipment and shall be designed, constructed and operated so that the new facilities will not increase the risk of odor emissions from the site.

C. The facility, including both existing and new facilities, shall comply with applicable air pollution control requirements of the Puget Sound Air Pollution Control Agency, including both procedural and substantive standards.

D. A copy of the current Spill Prevention Control and Countermeasure Plan (SPCCP) as required by the Puget Sound Air Pollution Control Agency shall be on file with the DCD.